No. 16-60375

**UNITED STATES COURT OF APPEALS**
**FOR THE FIFTH CIRCUIT**

**ADECCO USA, INC.,**

*Petitioner and Cross-Respondent,*

v.

**NATIONAL LABOR RELATIONS BOARD,**

*Respondent and Cross-Petitioner.*

On Petition for Review of Order and Decision of the
National Labor Relations Board
No. 32-CA-142303

# ADECCO'S REPLY IN SUPPORT OF MOTION FOR ORDER SUMMARILY GRANTING ITS PETITION FOR REVIEW IN LIGHT OF SUPREME COURT'S DECISION IN *EPIC*

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The Board makes three arguments in opposing Adecco's Motion for an order summarily granting its Petition in its entirety: (i) this Court lacks jurisdiction to address whether the Supreme Court's decision in *Epic* precludes enforcement of the Board's finding that Adecco's arbitration agreement unlawfully interfered with an employee's right to file ULP charges; (ii) post-*Epic*, this Court already granted Board motions for a limited remand so the Board can determine in the first instance whether an employer's arbitration agreement (lawful under *Epic*) nevertheless violates the National Labor Relations Act ("NLRA") because it interferes with the right to file ULP charges; and (iii) a remand would allow the Board to assess the appropriate remedy if it finds a violation of the NLRA under *Boeing*, which set forth the Board's "new standard for analyzing work rules." (Resp. 2.) None of those arguments has merit.

Indeed, more administrative proceedings would be a waste of time and resources. The Supreme Court has spoken (yet again), and under the Federal Arbitration Act, arbitration agreements like Adecco's must be enforced as written, without regard to how an agency (here, the NLRB) interprets their terms under the particular statute (the NLRA) it administers. *Epic*, slip op. 16 ("In many cases over many years, this Court has heard and rejected efforts to conjure conflicts between the [FAA] and other federal statutes."). All that's left to do is apply basic

principles of contract interpretation; when that is done, only one conclusion is possible: Adecco's agreement does not interfere with the right to file ULP charges.

## ARGUMENT

### I. This Court has jurisdiction to grant Adecco's Motion.

Adecco preserved review of whether the FAA disposes of the Board's finding that its agreement unlawfully interferes with the right to file ULP charges. In its brief to the Board, Adecco argued at length that the opt-out clause ensures that its arbitration agreement is valid and enforceable,[1] explaining that the Board's decisions in *D.R. Horton* and *Murphy Oil* were inapposite because they did not apply to "voluntary arbitration agreements such as the one at issue in this proceeding." (ROA 83-84.) Adecco spent the next three pages of its brief responding to the Board's arguments to the contrary (ROA 84-86), and even relied on *Johnmohammadi v. Bloomingdales, Inc.*, 755 F.3d 1072, 1075-76 (9th Cir. 2014), which specifically invoked the FAA and upheld an agreement with an opt-out clause nearly identical to Adecco's against challenges that it "interfered with [or] restrained" employees in the exercise of their NLRA rights and "impermissibly impinged upon the role of the [Board]." (ROA 86-87, 89

[1] That clause provides that, "[w]ithin 30 days after signing this Agreement, Employee may submit a form stating that Employee wishes to opt out and not be subject to the … Agreement…. An Employee who opts out as provided in this paragraph will not be subject to any adverse employment action as a consequence of that decision and may pursue available legal remedies without regard to the … Agreement." (ROA 20.)

(alterations omitted).) Adecco made its case abundantly clear—its arbitration agreement was immune from attack under the NLRA. *See, e.g.*, *Independent Elec. Contractors of Houston, Inc. v. NLRB*, 720 F.3d 543, 550-51 (5th Cir. 2013) (purpose of 29 U.S.C. § 160(e) "is to give the Board notice and an opportunity to confront objections to its rulings before it defends them in court"; so long as issue is "implicit" in the briefing, an express "objection" is not required).

Thus, the crux of Adecco's summary judgment motion to the Board was that its agreement "is a legal agreement to arbitrate," and thus, "Adecco did not commit any unfair labor practice by seeking to enforce the agreement according to its terms." (ROA 81.) That is precisely its argument here. *Epic*, slip op. 24 (under FAA, courts must enforce arbitration agreements "according to their terms"). This Court can and should decide that the Board cannot enforce any of its findings regarding Adecco's arbitration agreement.[2]

## II. This Court has yet to address the issue raised in Adecco's Motion.

The Board is disingenuous when it says this Court "has granted near-identical motions to remand [cases] to the Board." (Resp. 3.) In all but one of the cases cited, the employer (for whatever reason) did not oppose the Board's motion

[2] In any event, and contrary to the Board's argument, *Epic* was an intervening change in the controlling law as it relates to enforcement of *employee* arbitration agreements (the pre-*Epic* decisions the Board cites did not involve the employment context, Resp. 6), constituting "extraordinary circumstances" warranting this Court's review under 29 U.S.C. § 160(e).

for a partial remand on the charge-interference issue. (Resp. 4.) In the one case where the Board's motion was opposed (*Brinker Int'l Payroll Co. v. NLRB*, 5th Cir. No. 15-60859), the employer did not file a response. Thus, none of the cases cited by the Board addressed whether *Epic* prevents the Board from enforcing a charge-interference finding in a case like this one.

## III. This Court, not the Board, decides whether Adecco's agreement interferes with the right to file ULP charges.

The problem with the Board's request for a remand is that it rests on the erroneous assumption that this case is a "work-rule" case. (Resp. 2, 10.) This case has nothing to do with workplace rules. Whether analyzed under *Lutheran Heritage* or *Boeing*, workplace rules are unilaterally imposed on employees by the employer. Nanavati's agreement with Adecco, however, was the result of a *voluntary* choice on his part (not to opt out, *supra* at 2). Thus, the Board's finding that Adecco's agreement interferes with an employee's right to file ULP charges rests on its interpretation of a *mutual*, binding contract that federal law (the FAA) emphatically favors.

While the Board's judgment in how employees might read workplace rules is arguably entitled to deference, that is not the case when the Board is interpreting contracts subject to the FAA. *E.g.*, *NLRB v. Am. Firestop Solutions, Inc.*, 673 F.3d 766, 768 (8th Cir. 2012) ("We review de novo the Board's contract interpretations that are not based on policy under the Act."); *Wilson & Sons Heating & Plumbing,*

*Inc. v. NLRB*, 971 F.2d 758, 760 (D.C. Cir. 1992) ("In contrast to the substantial deference afforded the Board's fact findings … we give its interpretation of a contract no particular deference." (quotations omitted)); *Local Union 36, Int'l B'hood of Elec. Workers v. NLRB*, 706 F.3d 73, 82 (2d Cir. 2013) (same; "the interpretation of contracts falls under the special, if not unique, competence of courts"). As the Supreme Court made clear, courts should not "defer[] to the Board's remedial preferences where such preferences potentially trench upon federal statutes and policies [like the FAA] unrelated to the NLRA." *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 144 (2002) (emphasis added). "[T]he Board has not been commissioned to effectuate the policies of the [NLRA] so single-mindedly that it may wholly ignore other and equally important Congressional objectives." *Southern S.S. Co. v. NLRB*, 316 U.S. 31, 47 (1942). When interpreting arbitration agreements, courts have the final say.

And under settled rules of contract interpretation, this Court should read the express carve-out in Adecco's agreement—which specifically tells the employee that he or she can file charges with the "National Labor Relations Board" (ROA 19, ¶ 4)—as it is written. *See United Offshore Co. v. S. Deepwater Pipeline Co.*, 899 F.2d 405, 410 (5th Cir. 1990) (confining review of arbitration agreement to "plain meaning" of terms). The agreement even provides the website for the Board. If that were not enough, Adecco's agreement assures employees they "will not be

retaliated against, disciplined or threatened with discipline" if they exercise their section 7 rights, which includes filing a ULP charge. (ROA 19, ¶ 5.)

The only ambiguity that can possibly arise with Adecco's agreement is if the employee unreasonably refuses to read it. In that regard, *Boeing* and *Lutheran-Heritage* do nothing but distract from the dispositive issue: they are Board-created tests that use hypothetical scenarios to decide whether a hypothetical employee *might* read a contract provision as prohibiting something that the contract already says is permitted. Perhaps such tests prove useful when addressing workplace rules, but they have no role when interpreting agreements subject to the FAA. *See Volt Info. Sciences, Inc. v. Bd. of Trustees*, 489 U.S. 468, 475 (1989) (under FAA, courts should apply "general state-law principles of contract interpretation").

Still, the Board argues that even if an Adecco employee could understand that he or she can file charges with the Board, "***the waiver*** might lead the employee to believe he was precluded from filing collective Board charges." (Resp. 8 (emphasis added).) ***That proves Adecco's point***: the Board's finding that Adecco's agreement unlawfully interferes with the right to file ULP charge is simply a veiled attempt to attack the *same* class action waiver that *Epic* upheld over challenges that it interfered with employees' section 7 rights under the NLRA. Specifically, the Board argues that the requirement that an employee arbitrate "any and all disputes, claims or controversies" in his or her "individual capacity" could be understood as

"further interfering with employees' access to the Board." (Resp. 8.) But contract language requiring the employee to bring claims in his or her "individual capacity" is part and parcel of the class action waiver, which *Epic* declared lawful and enforceable notwithstanding the NLRA.

Indeed, the Board's real motive in bringing this case is reflected in the fact that its remedy for the alleged charge-interference violation has nothing to do with Nanavati, who had no problems filing a ULP charge. Instead, the Board wants Adecco to "rescind" or "revise" its arbitration agreement; in other words, the Board wants the power to regulate what employer arbitration agreements say. But that is precisely what *Epic* forbids. Slip op. 20 ("the 'reconciliation'" of FAA and NLRA "is a matter for the courts, not agencies"; otherwise, the Board would "effectively bootstrap itself into an area [arbitration agreements] in which it has no jurisdiction" (quotations & alteration omitted)).

Finally, *Murphy Oil* supports Adecco's position. Like here, Murphy Oil's agreement provided that employees remained free to "participat[e] in proceedings to adjudicate [ULP] charges before the Board." 808 F.3d 1013, 1020 (5th Cir. 2015). The Board argued, as it does here, that was not sufficient:

> it leaves intact the entirety of the … Agreement including employees' *waiver of their right to commence … any group, class or collection action claim*, and that could be reasonably interpreted as prohibiting employees from pursuing an administrative remedy since such a claim could be construed as having commenced a class action in the event that the Board decides to seek classwide relief.

*Id*. (quotations & alterations omitted, emphasis added). This Court disagreed: "Reading the contract as a whole, it would be unreasonable for an employee to construe … [it] as prohibiting the filing of Board charges when the agreement ***says the opposite***. *Id.* (emphasis added).

Adecco's agreement expressly states that employees can still file ULP charges.[3] That's enough under *Murphy Oil*.[4]

## CONCLUSION

The Court should grant Adecco's Motion for an order summarily granting its Petition for Review in its entirety.

DATED this 27th day of June, 2018.

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[3] As Adecco explained in its merits briefs, as a practical matter, once an employee files a ULP charge, the Board decides whether it wants to pursue it on a collective basis, i.e., on behalf of a group of employees.

[4] The express carve-out for filing ULP charges distinguishes Adecco's agreement from the agreement in *D.R. Horton*, which also did not have an opt-out clause. 737 F.3d 344, 363-64 (5th Cir. 2013) (noting that none of the arbitration agreement's exclusions "refer[red] to unfair labor practice claims").

## CERTIFICATE OF COMPLIANCE

Pursuant to FRAP 27(d)(2)(A) and 32(g)(1), I certify that the foregoing Motion contains 1,935 words of proportionally-spaced, 14-point type, and that the word processing system used was Microsoft Word 2010.

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## CERTIFICATE OF SERVICE

I certify that on June 27, 2018, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the Court's CM/ECF system. I further certify that counsel for parties listed below are registered users who have been served through the CM/ECF system.

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I further certify that on June 27, 2018, I mailed a copy of the foregoing via First Class U.S. mail, to:

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